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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98

BELLSOUTH OPPOSITION/COMMENTS ON PETITIONS FOR RECONSIDERATION/CLARIFICATION

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BellSouth Corporation, on behalf of its affiliated companies[1] ("BellSouth"), and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), files this opposition to and comments on the petitions for reconsideration/clarification filed in the above-captioned proceeding.

I. INTRODUCTION

Several companies have filed petitions for reconsideration and/or clarification seeking to expand the already extensive list of unbundled elements that the Commission established in its *UNE Remand Order*.[2] BellSouth's unbundled network element price list already includes more than 150 separate offerings. As Justice Breyer explained in the

[1] BellSouth Corporation is a publicly traded Georgia corporation that holds the stock of companies which offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide. BellSouth participated in all aspects of the pleading cycle in this rulemaking proceeding.

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999)("*UNE Remand Order*").

Iowa Utilities Board decision, "it is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."[3]

There are three overarching reasons for the Commission not to expand this already long list of elements. First, doing so will put the Commission at even greater odds with the Supreme Court's *Iowa Utilities Board* decision. The more the Commission adds to the list of UNEs, the more it increases the legal risk that its unbundling standard and the results of that standard will be viewed by the courts as inconsistent with that decision. Second, the Commission has emphasized the need for certainty in the results of its *UNE Remand Order*. Further additions to the list threaten that certainty. Finally, the petitions seeking to expand the list of UNEs are subject to a host of procedural and factual infirmities. For example, instead of relying on record evidence, as legally required, they seek to introduce new evidence into the record. The Commission cannot rely on any such evidence.[4] The legal risks of expanding its UNE list and the brief amount of time that has passed since the *UNE Remand Order* preclude the creation of any additional unbundling requirements in response to the petitions and motions for clarification.

The Commission should make two changes to its *UNE Remand Order*. First, BellSouth agrees with Bell Atlantic that the Commission should not permit CLECs to connect their loops directly to incumbent LEC NIDs. Second, the Commission's should revisit its requirements that incumbent LECs construct single points of interconnection.

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[3] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 429 (1999) (Breyer, J. concurring in part and dissenting in part) ("*AT&T v. Iowa Utilities Board*").

[4] *See* 47 C.F.R. 1.429(b).

II. THE COMMISSION SHOULD NOT RAISE THE THRESHOLD NUMBER OF LINES FOR SWITCHING RELIEF.

Several parties seek to gut the Commission's decision to unbundling local switching ("ULS") by upping the threshold number of lines for switching relief from 4 to as many as 50 lines, as well as by making assorted other changes.[5] These changes would put the Commission further at odds with *Iowa Utilities Board.* And, by substantially reducing the value of switching relief to incumbent LECs, granting these requests would eliminate any rationale for the Commission to require that incumbent LEC offer EELs as a precondition to obtaining switching relief.

The *UNE Remand Order* concluded that incumbent LEC switching was subject to unbundling under the Commission's standard.[6] The *UNE Remand Order* reached this conclusion despite substantial factual evidence in the record of extensive switch deployment by CLECs. In light of that evidence, however, the Commission struck something of a compromise. Because CLECs have deployed switches extensively to cherry-pick lucrative business customers, the *UNE Remand Order* offers incumbent LECs the opportunity to take switching off the UNE list.[7] The Commission in essence created a regulatory bargain: if an incumbent offers EELs in a particular area, it may remove ULS from the list of UNEs it must make available for customers with more than 3 lines in certain restricted geographic areas.[8]

Several petitioners seek to destroy the potential value of this conditional relief by raising the threshold for the number of lines. AT&T for example, suggests that 8 lines be

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[5] *See, e.g.,* AT&T Petition at 12, Sprint Petition at 8, Telecommunications Resellers Petition at 1.
[6] *UNE Remand Order*, ¶ 253.
[7] *Id.*, ¶¶ 276-99.

a new threshold.[9] Sprint thinks the threshold should be impressively high – 59 lines seems right to Sprint.[10] MCI WorldCom also suggests 8 lines because it may be a crossover point for ordering service over a single DS1.[11]

The Commission should leave the threshold where it is, if only because, as MCI WorldCom points out, the cross-over point for moving to DS1 service is rapidly sinking below 8 lines toward the current threshold.[12] In fact, using xDSL technology, carriers can easily serve an 8-line customer over a single copper loop, suggesting that the Commission's threshold is too high. At a minimum, rapid technological progress supports leaving the more than 3-line threshold where it is.[13]

In seeking to introduce new evidence in the record, none of the petitioners requesting a change in the threshold for switching relief address the extensive factual record of CLEC switch deployment. The market facts in the record demonstrate that CLECs are using their own switches to serve a broad range of business customers. To counter this real evidence, petitioners rely on a series of purely hypothetical justifications for a higher threshold.[14] These late-filed and purely hypothetical justifications cannot supplant the real factual evidence in the record.[15]

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[8] Whether requiring EELs as a precondition for switching relief makes sense, especially given the extensive evidence of CLEC switch deployment, is discussed in Commissioner Powell's Separate Statement.

[9] AT&T Petition at 12.

[10] Sprint Petition at 8

[11] MCI WorldCom Petition at 20.

[12] MCI WorldCom Petition at 22.

[13] Petitioners' arguments that the Commission's threshold for unbundling relief should be turned into a requirement for unbundling up to the threshold number of lines for every customer should also be rejected. This requested relief would turn the threshold on its head, reversing the Commission's reasoning that the cut-over of multi-line customers is being administered effectively, as demonstrated by the market success of CLECs in serving business customers.

[14] *See, e.g.*, AT&T Petition, Exhibit A (Statement of Richard A. Chandler).

[15] *See* 47 C.F.R § 1.429. As part of the local switching element, MCI WorldCom's petition reargues its previous position that the Commission should require incumbent LECs to provide MCI WorldCom with

III. THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION ON PACKET SWITCHING.

Petitioners argue that the Commission should have reached a different result in its decision not to require unbundling of packet switching functionality except in limited circumstances. The Commission has already rejected arguments that DSLAMs be defined as network elements separate from packet switching.[16] The petitions provide no reason to change course.

None of the petitions directly confront the basic fact underlying the Commission's decision not to unbundled packet switching: "we recognize that the presence of multiple requesting carriers providing service with their own packet switches is probative of whether they are impaired without access to unbundled packet switching."[17] The Commission pointed to the fact that "competitive LECs and cable companies appear to be leading the incumbent LECs in their deployment of advanced services."[18] And it expressly noted that "[s]everal parties, in addition to incumbent LECs, argue that the Commission should not unbundle packet switching or DSLAMS generally."[19]

The petitioners seeking unbundling of packet switching functionality simply reiterate arguments that the Commission has already rejected. Further, they do not confront the market facts, on which the Commission relied, that in this arena, competitive

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whatever customized routing signaling protocol that MCI WorldCom deems satisfactory, in MCI WorldCom's sole discretion. MCI WorldCom Petition for Clarification at 19. As the Commission noted in the *UNE Remand Order*, BellSouth provides MCI WorldCom with an individualized customized routing solution. *UNE Remand Order*, ¶ 463. BellSouth has further tested its solution since that order was issued, although MCI WorldCom opted not to participate. The tests indicated that the solution provides MCI WorldCom what it says it wants.

[16] *UNE Remand Order*, ¶ 304.

[17] *Id.*, ¶ 306.

[18] *Id.*, ¶ 307

[19] *Id.*, ¶ 308.

carriers are thriving without unbundled incumbent LEC packet switching functionality. And, additional competition is coming from a broad range of alternative sources.[20]

AT&T's request for access to an "xDSL-equipped loop" is no more than a request for unbundled incumbent LEC packet switching functionality.[21] The market facts demonstrate that CLECs are successfully provisioning their own xDSL service everyday. As the Commission noted, this led several CLECs to oppose the unbundling AT&T here requests again. Throughout the line sharing proceeding,[22] BellSouth, and other ILECs, noted that CLECs could obtain from incumbent LECs the network elements necessary to provide voice service and then combine them with CLEC elements to provide multiple services to end-user customers. The Commission acknowledged this point by stating that "requesting carriers could obtain combinations of network elements and use those elements to provide circuit-switched voice service as well [as] data services."[23] In explaining its position, the Commission stated that "[i]n this scenario, *a requesting carrier would essentially share the line with itself by attaching a splitter to the loop at a technically feasible point* and separating the voiceband from the high frequency portion of the loop to provide both voice and xDSL services."[24] Thus, the Commission recognized that the CLEC would install the splitter, DSLAM and any other equipment in order to combine the elements to provide voice and data services. AT&T's request for an

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[20] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd at 2398, 2419-20, ¶ 428 (1999).

[21] AT&T Petition at 2.

[22] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147 and *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

[23] *Line Sharing Order,* ¶ 47.

[24] *Id.*, ¶ 47 n. 95 (emphasis added).

unbundled xDSL equipped loop contravenes both the *Line Sharing* and *UNE Remand Orders*.

IV. INCUMBENT LECS MUST BE ALLOWED TO RECOVER COSTS INCURRED IN CONDITIONING LOOPS.

A few petitioners seek to overturn the Commission's decision that incumbent LECs "should be able to charge for conditioning ... loops."[25] These petitioners present two arguments. First, they argue that a forward-looking network would not require loop conditioning because it would be built without bridge tap, load coils or other devices that might interfere with data transmission.[26] Second, they argue that no charges for loop conditioning are appropriate because under the standards applicable to network design today, no loop conditioning is necessary for loops under 18,000 feet.[27]

The Commission rejected both these arguments in the *UNE Remand Order*. In that order, the Commission adopted the commonsense position that if an incumbent LEC "may incur costs in removing" bridge tap or other devices, it must be allowed to recover its costs.[28] The Commission noted the arguments that Covad and Rhythms made then (and repeat now) and rejected them: "We agree that networks built today normally should not require voice-transmission enhancing devices on loops of 18,000 feet or shorter. Nevertheless, the devices are sometimes present on such loops, and the incumbent LEC may incur costs in removing them."[29] Covad, Rhythms and the other Petitioners add nothing in their petitions to the arguments already properly rejected by the Commission.

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[25] *UNE Remand Order*, ¶ 193.
[26] *See, e.g.* ,Rhythms and Covad Joint Petition at 3.
[27] *Id.* at 5.
[28] *UNE Remand Order*, ¶ 193.
[29] *Id.* The Commission's conclusion here recognizes that devices to enhance voice transmission may exists on loops for a variety of reasons. Although the current industry standard may not call for loading of plant under 18,000 feet, there existed perfectly valid design criteria that called for two points of loading,

The Commission's rule – where an incumbent LEC incurs costs to condition loops, it may recover those costs – is correct and consistent with Commission policy assigning responsibility for cost to cost causers. These carriers admit that incumbent LECs incur costs to condition loops. They seek to avoid the legal implications of this cost-causing by substituting a particular future network design that does not require conditioning for the type of service they wish to offer even though that network would conflict with the business needs of other CLECs and the incumbent LEC. Of course, a truly forward-looking network may very well substitute fiber and wireless technologies for copper loops. This network may contain no copper loops at all, leaving these particular CLECs, which depend on copper loops, high and dry. The Commission's TELRIC pricing methodology in no way supports the notion advanced by these petitioners that pricing can be based on the network design that creates the lowest price for each CLEC. The self-serving hypothetical network urged by these petitioners cannot overcome the undisputed fact that incumbent LECs incur costs to condition loops, and must be provided the opportunity to recover them.

V. THE COMMISSION ERRED WHEN IT MODIFIED ITS RULES REGARDING UNBUNDLED ACCESS TO NETWORK INTERFACE DEVICES.

BellSouth agrees with Bell Atlantic that the Commission should not have reversed its prior ruling regarding unbundled access to network interface devices ("NIDs").[30] In its *Local Competition First Report and Order*, the Commission appropriately declined to

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which can dramatically improve voice grade transmission, especially as the loop length begins to near 18,000 feet. BellSouth has enhanced loops in its networks under these circumstances, and others, in order to improve the quality of the voice grade service it offers. Whether voice enhancing devices exist on loops in accord with current standards, previous standards, or simply to improve network quality, an incumbent LEC incurs costs to remove the devices, and must be allowed the opportunity to recover those costs.

[30] *See* Bell Atlantic Petition at 11-13.

require an incumbent LEC to permit a new entrant to connect its loops directly to the incumbent LEC's NID.[31] Instead, the Commission "conclude[d] that a requesting carrier is entitled to connect its loops, *via its own NID*, to the incumbent LEC's NID."[32] The Commission reasoned that "the record in this proceeding does not permit a determination on the technical feasibility of the direct connection of a competitor's loops to the incumbent LEC's NID."[33] The Commission's new rule, however, requires incumbent LECs to "permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device . . . "[34]

BellSouth objects to this rule change. We agree with Bell Atlantic that the Commission has failed to demonstrate that the record warrants a change in the rules.[35] As Bell Atlantic points out, the Commission "identifies no evidence in the record to show that it is now technically feasible for competing carriers to connect their loop facilities directly to incumbent carriers' NIDs or how the overvoltage concerns have been addressed."[36] The Commission simply ignores the previous evidence of significant technical concerns, and focuses instead on issues of CLEC costs and potential delay in market entry. BellSouth submits that the technical issues (such as overvoltage) identified in the record have not been adequately refuted by commenters or the Commission. The Commission "cannot abruptly change course with no explanation or basis in the

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[31] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 394 (1996) ("*Local Competition First Report and Order*").
[32] *Local Competition First Report and Order*, ¶ 392 (emphasis added).
[33] *Id.*, ¶ 396.
[34] 47 C.F.R. § 51.319(b).
[35] Bell Atlantic Petition at 12-13.
[36] *Id.* at 13.

record."[37] Accordingly, the Commission should reverse its recent ruling and return to its prior determination that an incumbent LEC is *not* required to allow a competing carrier to connect its loops to the on-premises wiring through the incumbent's NID.

VI. THE COMMISSION SHOULD NOT REQUIRE INCUMBENT LECS TO CONSTRUCT A SINGLE POINT OF INTERCONNECTION IN CERTAIN SITUATIONS.

In its Petition, BellSouth asks the Commission to clarify that its rules do not require an incumbent LEC to construct a SPOI where the facilities are not owned or controlled by the incumbent.[38] The recent D.C. Circuit Court's decision, *GTE v. FCC,* regarding collocation lends support to BellSouth's interpretation.[39] In that decision, the D.C. Circuit struck down the Commission's rule requiring incumbent LEC's to allow collocating competitors to interconnect their equipment with the equipment of other collocating carriers.[40] The court found that this "cross-connects requirement imposes an obligation on LECs that has no apparent basis in the statute. Section 251(c)(6) is focused solely on connecting new competitors to LECs' networks."[41] As BellSouth explained in its petition, the Commission's order could be interpreted to require an incumbent to construct a SPOI in locations where it does not own facilities.[42] The court's rationale for not mandating that incumbents allow cross-connects between collocating carriers is just as applicable to the instant SPOI scenario. As the D.C. Circuit found, the statute requires

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[37] *Id.* (citing *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto Insurance Co.,* 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

[38] BellSouth Petition at 4-5.

[39] *GTE v. FCC*, No. 99-1176, 2000 U.S. App. LEXIS 4111 (D.C. Circuit March 17, 2000) ("*GTE v. FCC*").

[40] *Id.* at *20-21.

[41] *Id.*

[42] BellSouth Petition at 5.

incumbents to provide competing carriers with interconnection to their own networks, not the networks of other carriers.[43]

Bell Atlantic also filed a petition raising several concerns regarding the Commission's single point of interconnection ("SPOI") requirement.[44] Specifically, Bell Atlantic points out that situations could arise where the Commission's SPOI rule would result in excessive construction of new facilities by the incumbent LEC. One such example might be where two or more separate intrabuilding network cable (riser cable) systems exist in a multi-story, highrise office building, and a CLEC wants both systems to be extended (in totality) to a single point at both the originating and terminating ends of the intrabuilding network cable (riser cable) facilities. Clearly, construction of a SPOI in this circumstance would result in excessive and unnecessary costs to not only the ILEC, but also the building owner whose floor space would be necessary to accommodate construction of SPOIs at both the originating and terminating ends of the intrabuilding network cable(s) (riser cable(s)).

Another example involves garden terminals serving apartments, where there may be 20 or more existing terminal locations spread throughout the apartment complex. The *UNE Remand Order* could be interpreted to require ILECs to construct one main interconnection point (SPOI) in order to extend all of the separate wiring runs between the apartment units and the garden terminals to s single, remotely located SPOI. This configuration would require extensive cabling operations to extend all of the wire to one common location. This requirement is costly and overly burdensome. To minimize these burdens and disruptions to the properties of building owners, the Commission should

[43] *GTE v. FCC*, at *17.
[44] Bell Atlantic Petition at 13-15.

require the construction of SPOIs only at existing terminals or locations where no extensive re-cabling is required.

As the examples above illustrate, the Commission's requirement to build a single point of interconnection needs further clarification. BellSouth encourages the Commission, in reconsidering its SPOI rule, to review the clear instructions given by the courts regarding ILEC interconnection obligations. For example, the Commission is bound by the Eight Circuit's determination that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one."[45] Under the Commission's SPOI rule as written, incumbents could be forced to create a premium or gold-plated network that would be expensive, disruptive to property owners, and could result in an unauthorized taking of private property. Thus, clarification of the Commission's rule is needed.

The Commission must also adhere to the D.C. Circuit Court's recent decision regarding collocation. The Supreme Court in *Iowa Utilities Board*[46] and the D.C. Circuit in *GTE v. FCC*[47] have both admonished the Commission for its impermissibly broad interpretation of the term "necessary." As the D.C. Circuit stated, "[s]omething is *necessary* if it is *required* or *indispensable* to achieve a certain result."[48] As the examples above illustrate, the construction of a single SPOI is not always practical, efficient, or most importantly, *necessary* to achieve CLEC interconnection.

Thus, BellSouth urges the Commission to clarify that its rules do not require an incumbent to build a SPOI where the incumbent does not own or control the facilities. In

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[45] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir.1997), *rev'd in part and aff'd in part, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).
[46] *AT&T v. Iowa Utilities Board*, 525 U.S. 266, 388-390.
[47] *GTE v. FCC*, at * 13, 16-17.

addition, BellSouth agrees with Bell Atlantic that the Commission should not require the construction of a SPOI when CLEC interconnection to sub-loop UNEs can be accommodated in an efficient and cost-effective manner that obviates, or at least minimizes, the need for property owners to allocate additional space for facilities and terminal equipment. In clarifying its rules, the Commission is encouraged to rely on the courts' instructions to interpret the term "necessary" in a reasonable manner.

CONCLUSION

For the reasons set forth above, the Commission should reject the arguments of Petitioners seeking to expand the unbundling obligations imposed under the Commission's *UNE Remand Order*, and should revisit incumbent LEC obligations to allow CLECs to connect loops directly to incumbent LEC NIDs and to construct a single point of interconnection.

Respectfully submitted,
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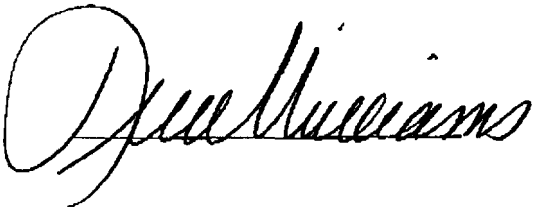
[48] *Id.* (emphasis included).

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of March, 2000, I caused copies of **BELLSOUTH OPPOSITION/COMMENTS ON PETITIONS FOR RECONSIDERATION/CLARIFICATION** to be served upon the parties listed on the attached service list by hand delivery (delivered by asterisk) or by first-class mail, postage prepaid.



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